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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Petitioner,

v.

CARLOS A. LASSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether the opinion below conflicts with decisions of this Court in requiring the employer to satisfy the more exacting "business necessity" burden of proof imposed in disparate impact cases, in an action by a single employee alleging discriminatory employment practices by the employer in filling a state manager's position (the promotion of one qualified employee rather than another qualified employee), but not challenging any facially neutral employment practices, tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities, in that:

A. The disparate impact allocation of burdens of proof has been applied by this Court only in cases where there was a challenge to facially neutral employment tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities, whereas the challenge in this case is to the employer's evaluation of the relative qualifications of two qualified employees and its decision to promote one qualified employee instead of another qualified employee;

B. Evidence of only one alleged incident of discrimination against a single employee in a private non-class action is insufficient to establish a "routine or regular" policy or practice of discrimination, which is a required element of a disparate impact case and which must be proved by the plaintiff as a threshold matter;

C. The disparate treatment, not the disparate impact, allocation of burdens of proof has been applied by this Court in actions alleging a systemwide "pattern or practice" of discrimination.

LIST OF PARTIES

The names of all parties to this action are included in the caption.

LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Woodmen of the World Life Insurance Society ("Woodmen") has no parent companies, subsidiaries or affiliates. In some states, it is also known as "Omaha Woodmen of the World Life Insurance Society".

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A. The disparate impact allocation of burdens of proof has been applied by this Court only in cases where there was a challenge to facially neutral employment tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities. . . 8

B. Evidence of only one alleged incident of discrimination against a single employee in a private, non-class action is insufficient to establish the required element of a "routine or regular" policy or practice of discrimination which must be proved by the plaintiff as a threshold matter in order to raise a disparate impact case. 21

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CARLOS A. LASSO,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Woodmen of the World Life Insurance Society, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered August 24, 1984.

OPINIONS BELOW

The United States District Court for the District of New Mexico entered its Memorandum Opinion and Order in favor of Woodmen on March 18, 1981. (App. B). The Opinion of the Court of Appeals for the Tenth Circuit vacating the judgment in favor of Woodmen and remanding for further proceedings was filed on August 24, 1984, and ntered the same day. (App. A). The Tenth Circuit Opinion is reported at . . F.2d . . (10th Cir. 1984).

JURISDICTION OF THIS COURT

The Opinion of the United States Court of Appeals for the Tenth Circuit was filed on August 24, 1984. (App. A at 1). Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit exists by virtue of 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATUTES INVOLVED

The following statutes are involved in the appeal: Title VII, 42 U.S.C. §2000(e), *et seq.* (App. C).

STATEMENT OF THE CASE

Carlos A. Lasso ("Lasso") brought this action against Woodmen, alleging it had committed unlawful employment practices. Jurisdiction in the District Court was alleged and found by the District Court to exist under Title VII, 42 U.S.C. §2000(e), *et seq.* The Complaint, filed on February 29, 1980, alleged that Woodmen failed to promote Lasso because of his Hispanic heritage and demoted him for the same reason.

Facts Material to the Question Presented

Woodmen is a private fraternal benefit society engaged in fraternal activities and also the sale of insurance as an incident of such activities. In the fall of 1977, a vacancy was about to occur in the state manager's position in New Mexico. It was a position that could be filled only by one individual. The manager's job is an important one since the state manager is responsible for Woodmen's activities and success in the state. The state manager's duties were to oversee all fraternal activities, to recruit and develop a field force, to manage the area managers under him, and to be ultimately responsible for all recruiting, training, and other activities. (Tr. 231). The state manager is responsible for the financial condition of his state area and for meeting the goals and budgets established for the state. (Tr. 391-392). Unlike the field representatives and area managers under him, the primary job of the state manager is not to sell insurance or to conduct initial recruiting. (Tr. 229, 302).

Three individuals were considered in filling the vacancy in 1977, Alfonso Trujillo, Mr. Lasso, and Grant Doney ("Doney"). (Tr. 235). Mr. Trujillo indicated that he was not interested in the state manager's job, so the choice was narrowed down to one between Mr. Lasso and Mr. Doney. (Tr. 272). Both Doney and Lasso were considered to possess strong credentials in different areas and the decision largely boiled down to a subjective judgment as to which candidate was best suited for the job. (App. B at 10-12, 13).

Mr. Lasso had been under contract as a field representative from March, 1971 to July, 1973. He was a successful field representative and the number one field

representative in 1971 and 1972 in New Mexico. (Tr. 37-38). From July, 1973 to January, 1978, Lasso was under contract as an area manager. As an area manager he had a very successful record in terms of persistency, premiums and area production volume. (Tr. 59, 69, 85 and 257-258). These were the factors used by Woodmen to judge the performance of area managers, and Woodmen acknowledged that Lasso had a good record as an area manager and as a salesman. (App B at 10-11; Tr. 231, 235, 257-258).

Mr. Doney had served as a part-time field representative in New Mexico in 1973 and 1974 and as a full-time field representative from April, 1975 to October, 1975. (Tr. 381-383). Doney was an area manager in New Mexico from October, 1975 until he was made state manager in 1977. (Tr. 384-385). As an area manager with Woodmen, Mr. Doney had a successful record, although his record as far as persistency, premiums and area production volume was less impressive overall than Mr. Lasso's record. (App. B at 11). There were ways in which Mr. Doney's production was superior. (Tr. 268-269). Prior to coming to Woodmen, Doney had extensive experience in the banking business, including extensive experience as an assistant manager, manager, and vice-president. In these positions, he was responsible for the total operation of his branch, including the supervision of numerous employees and all the managerial duties such as hiring and firing of personnel, budget, goals, projects, and day-to-day operation of the branch. (Tr. 374-378). Mr. Doney also owned and operated an employment agency for two years in which he had total responsibility for management, including hiring of employment counselors, handling salary commissions, budget and the day-to-day placement activities. (Tr. 379-380).

In filling the vacancy in 1977, Marvin Watkins, the

National Field Manager, reviewed the company records, and consulted with the outgoing state manager, several area managers in New Mexico and other employees who had personal contact with the candidates. (Tr. 287, 313). Mr. James Rigdon, the outgoing state manager, had numerous criticisms of Mr. Lasso's performance, including complaints about Mr. Lasso bypassing his state manager (Tr. 125-126, 127), personal disagreements with his state manager (Tr. 128, 131), declines in Lasso's recruiting (Tr. 134), carelessness in submitting goal papers (Tr. 135), and disagreements with his state manager on business matters (Tr. 138). Mr. Lasso viewed his state manager's supervision as "interference." (Tr. 129, 135-136, 139). Lasso also had problems with certain field representatives under him and other Woodmen employees. (Tr. 139-141, 325-327, 334-336, 351-356). Specifically, Mr. Lasso was writing business on customers already represented by other field representatives, and on at least two occasions, Mr. Lasso falsely informed the customers that their field representative was "deceased". (Tr. 325-327, 334-336).

After evaluating the two individuals and reviewing their relative qualities, Mr. Watkins picked Mr. Doney for a number of reasons which were directly related to job performance. Although Mr. Doney's sales record was less than Lasso's, he was much better at managing people and had much better management experience. (Tr. 235-237). Watkins felt that Doney was a better leader, more tolerant and more even-tempered. (Tr. 235-237). On the other hand, Lasso was perceived to be tempermental and more "self-centered." Lasso was observed to have difficulty with home office personnel and with his peers. (Tr. 235-237). Lasso was observed to be resistant to Woodmen's rules and did not like to follow orders. (Tr. 237).

At trial, Lasso introduced evidence, relating information from Woodmen's responses to interrogatories, showing that in 1977, Woodmen had 43.75% Spanish people working for the society in New Mexico, and 41% in 1978. (Tr. 97). No evidence appears in the record to show the number of individuals in this "pool" who possessed the skills or qualities necessary to be a state manager. No evidence was presented to show that any facially neutral tests for employment, aptitude or qualifications, or any particularized requirements or standards for promotion were used by Woodmen to deny Hispanics the opportunity for promotion. No evidence was introduced as to any other specific instance of discrimination against any other employee save the isolated decision to make Doney state manager instead of Lasso. No employment practice was singled out by Lasso as having been routinely or regularly used by Woodmen to deprive Hispanics of opportunities, or which caused any disparities in Woodmen's workforce.

In the fourteen and one-half years between 1963 and 1977, there were only two individuals, Mr. VandeLinde and Mr. Rigdon, who held the position of state manager in New Mexico. (Tr. 176-177). The turnover in New Mexico was very slow. Mr. VandeLinde (who preceeded Mr. Rigdon) served as state manager for twelve years. Mr. Lasso testified that up until Mr. Doney was chosen over him, he had never felt that he had been discriminated against, nor had Woodmen given him any reason to believe that he had been discriminated against. (Tr. 156).

Statement of Proceedings

A bench trial was held beginning January 14, 1981. On March 18, 1981, Judge Edwin Mechem entered his Memorandum Opinion and Order in favor of Woodmen.

(App. B). The Memorandum Opinion indicates that the District Court allocated the burdens and order of proof according to the disparate treatment framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (App. B at 11-12). The District Court found that Lasso had established a prima facie case of disparate treatment based upon his qualifications, his national origin and the statistical evidence offered at trial regarding the lack of Hispanics in management. (App. B at 12). The District Court further found that Woodmen had successfully rebutted the prima facie case by articulating non-discriminatory reasons for not choosing Lasso, including the fact that Doney had much more managerial and personnel experience, Doney's personality was better suited for the state manager's position, and Woodmen felt Doney possessed leadership qualities and managerial skills which Lasso lacked. (App. B at 12-13). The District Court then found that Lasso had failed to carry his burden of proving that the reasons offered by the defendant were pretextual. (App. B at 13).

Lasso appealed to the Court of Appeals for the Tenth Circuit on April 16, 1981. The Tenth Circuit filed its Opinion vacating the Judgment of the District Court and remanding for further proceedings on August 24, 1984. The Tenth Circuit found that the District Court erred in not making findings of fact and conclusions of law on the merits of a claim of disparate impact. (App. A). Petitioner here seeks review of that Opinion and Order.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT OPINION DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN THAT THE OPINION REQUIRES THE EMPLOYER TO SATISFY THE MORE EXACTING "BUSINESS NECESSITY" BURDEN OF PROOF IN A TITLE VII ACTION BROUGHT BY A SINGLE EMPLOYEE ALLEGING DISCRIMINATORY EMPLOYMENT PRACTICES IN THE FILLING OF A STATE MANAGER'S POSITION (THE PROMOTION OF ONE QUALIFIED EMPLOYEE RATHER THAN ANOTHER QUALIFIED EMPLOYEE), BUT NOT CHALLENGING ANY FACIALLY NEUTRAL EMPLOYMENT PRACTICES, TESTS OR QUALIFICATION STANDARDS.

A. The disparate impact allocation of burdens of proof has been applied by this Court only in cases where there was a challenge to facially neutral employment tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities.

The Opinion below failed to distinguish Lasso's disparate treatment claim from those claims that stress "disparate impact," as required by this Court's decisions in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and their progeny. The Court of Appeals' application of the disparate impact framework established by *Griggs* is, in the absence of any challenge or proof of facially neutral employment tests or qualification standards or requirements, clearly erroneous. The issue of what may properly be used to test qualifications for employment is not present in this case. In *McDonnell-Douglas*, this Court stated that:

> We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used. 411 U.S. at 803, n.14.

This Court recently recognized in *United States Postal Service Board of Governors v. Aikens*, .. U.S. .., 75 L.Ed. 2d 403 (1983), that: "[W]e have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants." 75 L.Ed.2d at 409, n.1.

In *McDonnell-Douglas, supra*, reaffirmed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [cite omitted]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a mere pretext for discrimination. *Burdine*, 450 U.S. at 252-253.

The District Court properly analyzed Mr. Lasso's claims under the "disparate treatment" framework established by *McDonnell-Douglas*. The material facts and claims in *McDonnell-Douglas* are not distinguishable from

those in the record below. The plaintiff in *McDonnell-Douglas* was a black mechanic and laboratory technician who was laid off in the course of a general reduction in his employer's work force. He protested vigorously that "his discharge and the general hiring practices of petitioner were racially motivated." 411 U.S. at 794. As in this case, the employer in *McDonnell-Douglas* did not dispute the employee's qualifications and acknowledged that his past work performance was "satisfactory." 411 U.S. at 802. Importantly, this Court expressly noted that the court below had erroneously relied upon *Griggs*. 411 U.S. at 805-806. The Court in *McDonnell-Douglas* recognized that:

> . . . *Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions.* Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Id., at 430, 28 L.Ed.2d 158. *Respondent, however, appears in different clothing.* He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And *petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee.* 411 U.S. at 806. (Emphasis added).

This case likewise differs from *Griggs* in important respects. Lasso alleged that he applied and was qualified

for the job of state manager. Woodmen acknowledged that Lasso was qualified for the job and that his past work performance was satisfactory. (Tr. 235, 257-259, 264-265). Indeed, Mr. Lasso and Grant Doney were the only persons ultimately considered for the job.[1] (Tr. 265). Mr. Lasso was not "rejected" for lack of qualification. Nor did Woodmen choose Mr. Doney over Mr. Lasso on the basis of any standardized testing device or minimum qualification standards which overstated what was necessary for the position. Mr. Doney was selected because the employer felt that he had much more managerial and personnel experience, that his personality was better suited for the state manager's position, and that Mr. Doney possessed leadership qualities and managerial skills which Mr. Lasso lacked. (Tr. 235-237).[2]

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[1] A third qualified individual, Mr. Alfonso Trujillo, was also considered for the job. Mr. Trujillo took himself out of consideration for personal reasons prior to the time the decision was made. (Tr. 272).

[2] The Tenth Circuit's Opinion below conflicts with its own prior decisions. **Mortensen v. Callaway**, 672 F.2d 822 (10th Cir. 1982) is nearly directly on point. In **Mortensen**, a female employee alleged that she was passed over for a position as supervisory chemist because she was a woman. The head of the Chemical Laboratory Division was responsible for recommending a new branch supervisor. The personnel office gave him a list of three qualified individuals, including the plaintiff. One of the three was not interested in the position. The division head knew both remaining candidates well. He assigned both to the vacant position for sixty days to assess their suitability for the position, then interviewed them both, asking each the same nine questions. He then evaluated them according to forty-two attributes he believed were important to the managerial position. Additionally, he reviewed the candidates' personnel files. The Tenth Circuit held, as did the trial court in this case, that the division head had based his recommendation on a legitimate, objective belief that the male candidate was more qualified and more likely to be a successful branch manager. Importantly, the Tenth Circuit held that Mortensen had failed to prove a prima facie case of disparate impact because, "[W]hile Mortensen introduced statistics showing a lack of women supervisors in test operations at the Army's Dugway Proving Ground in Utah, **she has not pointed to any employment practice that, neutral on its face, has caused women not to be promoted to supervisory positions.**" 672 F.2d at 824. (Emphasis added).

This Court has consistently recognized that "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classess." *Burdine*, 450 U.S. at 252, n.5. In *Griggs* and each subsequent disparate impact case, this Court has uniformly applied the disparate impact allocation of burdens of proof *only* in those cases where there was a challenge to facially neutral employment tests, requirements or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities. Thus, in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), the Court held that the employer's requirement of a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to certain jobs, even if neutral on its face, could not be maintained if it operated to "freeze" the status quo of prior discriminating employment practices. 401 U.S. at 430. The Court in *Griggs* stated that the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432.

Similarly, in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), a certified class of Negro employees challenged Albemarle's requirements that applicants for employment in the skilled lines of progression have a high school diploma and pass two tests. Citing *Griggs*, the Court held that: "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the 'burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" 422 U.S. at 425. In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Court applied

the disparate impact analysis to the claims of a class of former heroin users who participated in a methadone maintenance program, and who challenged their employer's "facially neutral" policy against employing persons who use methadone on the ground that the policy excluded a disproportionately large number of minority applicants. Likewise, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court found that minimum statutory height and weight requirements for corrections counselors were the sort of "facially neutral" barrier to equal employment for women forbidden by Title VII. The Court focused on the disparate effect that the minimum height and weight standards had on applicants - classifying far more women than men as ineligible for employment. In *Guardians Association v. Civil Service Commission of the City of New York*, __ U.S. __, 77 L.Ed.2d 866 (1983), black and Hispanic police officers challenged several written examinations used to make entry level appointments. The Court found that the District Court "correctly relied on *Griggs v. Duke Power Co.* [cite omitted] and its progeny, as the framework for its Title VII disparate impact analysis." 77 L.Ed.2d at 871.

In *Connecticut v. Teal*, 457 U.S. 440 (1982), a case cited and apparently relied upon in the Tenth Circuit's Opinion below,[3] several black employees challenged a selection process that required, as the first step, a passing score on a written test. The Court found that the disparate impact

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[3] **The Opinion below also cited and relied upon Rule v. International Association of Bridge, Structural and Ornamental Ironworkers, Local No. 396, 568 F.2d 558 (8th Cir. 1978), which did apply the disparate impact analysis, but did so because Mr. Rule challenged the employer's requirement that applicants possess a high school diploma or its equivalent in order to be eligible for the apprenticeship program, which the court held to be "apparently neutral employment selection criteria which in fact have a statistically disproportionate impact upon blacks." 568 F.2d at 566. No such "apparently neutral employment selection criteria" are at issue in this case.**

from this pass-fail barrier to employment opportunity stated a prima facie case of employment discrimination. The Court stated that:

> Section 703(a) (2) prohibits discriminatory "artificial, arbitrary, and unnecessary barriers to employment," 401 U.S., at 431, 28 L.Ed. 2d 158, 91 S.Ct. 849, that "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment opportunities." Relying on Section 703(a) (2), *Griggs explicitly focused on employment "practices, procedures, or tests,"* 401 U.S. at 430, 28 L.Ed.2d 158, 91 S.Ct. 849, *that deny equal employment "opportunity,"* Id., at 431, 28 L.Ed. 2d 158, 91 S.Ct. 849. *We concluded that Title VII prohibits "procedures or testing mechanisms that operate as "built-in headwinds' for minority groups" . . . The examination given to respondents in this case surely constituted such a practice and created such a barrier.* 457 U.S. at 448-449.
> Emphasis Added.

Moreover, the Court in *Teal* recognized that "[i]n considering claims of disparate impact under Section 703 (a) (2) this Court has consistently focused on employment and promotion *requirements* that create a discriminatory bar to opportunities," 457 U.S. at 450. (Emphasis added). In contrast to *Griggs*, *Teal* and Section 703(a) (2), this case does not involve any employment practice or requirement which "limits, segregates or classifies" employees or applicants for the state manager's position.

In this case, though managerial and personnel experience were factors which were considered, Woodmen had no minimum requirement for the position. Though such intangible qualities as leadership, the ability to get along with other personnel, and managerial skills were considered, there were no minimum requirements for the position.

The record is devoid of any evidence that any test, employment requirement, standard or condition operated to classify Hispanics as ineligible for promotion or barred Hispanics from the state manager's position. To the contrary, Mr. Lasso (as well as another Hispanic, Alfonso Trujillo) was considered qualified and eligible for the position, but was not selected because another applicant was considered to be better suited for the position. (Tr. 235-237). Lasso, himself, testified at trial that up until Mr. Doney was chosen over him for the state manager's position, he had never been discriminated against, nor had Woodmen given him any reason to believe that he had been discriminated against. (Tr. 111-112). Lasso further testified that it was his belief, not that any tests of employment qualifications or requirements denied *Hispanics* the opportunity to be promoted to state manager, but that *he* was not promoted because Woodmen felt New Mexico was not ready for a Hispanic state manager.[4] (Tr. 111-112). This presents a classic case of disparate treatment. During the trial itself, Lasso testified that he did not even know what criteria was used by Woodmen to pick a state manager. (Tr. 149).

This Court's decision in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), is on point. *Furnco* was an action by three black bricklayers who sought employment with Furnco Construction Corporation (Furnco). Furnco hired a superintendent for a specific job and then delegated to him the task of securing a competent work force. The three plaintiffs complained about the superintendent's

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[4] Lasso testified that his belief was based on a statement allegedly made to him by Mr. Bob VandeLinde; however, Mr. VandeLinde testified to an entirely different conversation in which Lasso expressed his own racial prejudices, not Woodmen's. (Tr. 283-285). The trial court in finding that Lasso had not been discriminated against (App. B), implicitly resolved any credibility questions in favor of Woodmen.

policy and practice of not accepting applications at the gate, but instead hiring only persons he knew to be experienced and competent or persons who had been recommended to him as similarly skilled.[5] The plaintiffs were not hired, though they were fully qualified and had attempted to secure employment by appearing at the jobsite gate. Statistics at trial showed a low percentage of black bricklayers in Furnco's workforce. The trial court analyzed the claims under both the disparate treatment and disparate impact theories, and held that the plaintiffs had failed to prove a claim under either theory. The Court of Appeals for the Seventh Circuit, concluding that under the disparate treatment theory the plaintiffs had made out a prima facie case which had not been effectively rebutted, reversed. This Court granted certiorari to consider the exact scope of the prima facie case under *McDonnell-Douglas* and the nature of the evidence necessary to rebut such a case.

This Court held that the District Court had improperly applied the disparate impact analysis. Specifically, the Court stated that "this case did not involve employment tests, which we dealt with in *Griggs v. Duke Power Co.*, [cite ommitted], and in *Albemarle Paper Co. v. Moody*, [cite omitted], or particularized requirements such as the height and weight specifications considered in *Dothard v. Rawlinson*, [cite omitted]." 438 U.S. at 576, n. 7. Significantly, the Court recognized that the employer (Furnco) had conceded that the three plaintiffs were qualified, and the case raised no questions regarding exactly what sort of requirements an employer can impose upon any particular job:

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[5] Similarly, in this case, Marvin Watkins (the National Field Manager), reviewed company records, consulted with the outgoing State Manager, several New Mexico area managers and other personnel who had personal contact with the candidates, then made a recommendation to the president and the administrative officers of the society. (Tr. 234-235).

> We note that this case does not raise any questions regarding exactly what sort of requirements an employer can impose upon any particular job. Furnco has conceded that for all its purposes respondents were qualified in every sense. Thus, with respect to the McDonnell-Douglas prima facie case, the only question it places in issue is whether its' refusal to consider respondents' applications at the gate was based upon legitimate, nondiscriminatory reasons and therefore permissible. 438 U.S. at 577, n.8.

In like manner, this case raises no questions regarding what sort of requirements an employer can impose upon a particular job. The only question this case places in issue is whether, after considering *both* Mr. Lasso and Mr. Doney for the job, Woodmen's decision to hire Mr. Doney was based upon legitimate, nondiscriminatory reasons.

The material facts in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), are strikingly similar to those in this case . In *Burdine*, the Court reaffirmed the disparate treatment analysis established by *McDonnell-Douglas*, and applied it to the claims of a female employee who was passed over in filling a supervisor's position then later terminated. The position was filled by the Executive Director of TDCA after consultation with personnel within TDCA. The District Court held that neither decision was based on gender discrimination, and relied upon the Executive Director's testimony that the decisions were based on consultation among trusted advisors and a nondiscriminatory evaluation of the relative qualifications of the individuals involved, such as the fact that the three individuals did not work well together. The Court of Appeals for the Fifth Circuit reversed in part, holding that, to satisfy its burden of proof the employer "must prove that those he hired . . . were somehow better qualified than was plaintiff; in other words, comparative

evidence is needed." 450 U.S. at 256. This Court reversed the Court of Appeals, holding that *McDonnell-Douglas* and its progeny establish that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produces evidence of legitimate nondiscriminatory reasons'." *Id.* The Court further stated that : [T]he statute [Title VII] was not intended to 'diminish traditional management prerogatives'. . . It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired." 450 U.S. at 259. Moreover, the Court stated that:

> The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of the white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. 450 U.S. at 259.

The employer in this case, Woodmen, had discretion to choose between two qualified candidates who had strong credentials in different areas.[4] It should be emphasized that

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[4] Likewise, in Colon-Sanchez v. Marsh, 733 F.2d 78 (10th Cir. 1984), the Tenth Circuit held that "where applicants are equally qualified, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." 733 F.2d at 82. In Colon-Sanchez, as in this case, the two candidates for promotion possessed strong credentials in different areas. Hence, they were not "equally qualified" in the strictest sense. The Tenth Circuit recognized that all that is required is that they each possess the "objective qualifications for a particular position." 733 F.2d at 82, n.1. One candidate had strong "mechanical or technical" credentials, while the other possessed strong "administrative" credentials.

it is the trial court which must determine if the employer's reasons are legitimate and non-discriminatory, or pretexts for discrimination. The trial court must determine the credibility of the witnesses and the reasons advanced by the employer. The District Court considered the reasons provided by Woodmen and was convinced that they were legitimate. (App. B at 12).

This Court's most recent decisions applying the disparate treatment analysis further illustrate the Tenth Circuit's error below. In *United States Postal Service Board of Governors v. Aikens,* U.S. , 75 L.Ed.2d 403 (1983), a black employee claimed that the Postal Service had discriminatorily refused to promote him to higher positions. The Court held, consistently with Woodmen's contention herein, that an employee who has shown only that he was a minority, that he applied for a promotion for which he possessed the minimum qualifications, that the employer selected a nonminority applicant, and that white persons were consistently promoted and detailed over him and all other black persons, established a prima facie case of disparate treatment, *not* disparate impact. 75 L.Ed.2d at 409. Specifically, the Court stated that: [W]e have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants." 75 L.Ed.2d at 409, n.1.

Likewise, in *Ford Motor Company v. Equal Employ-*

Footnote 6, cont'd.
The court in Colon-Sanchez held that the disparate treatment analysis was properly applied inasmuch as the Army had selected one qualified applicant over another using subjective criteria and judgment that one had superior administrative experience and skills. See also, Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982); Verniero v. Air Force Academy School District No. 20, 705 F.2d 388 (10th Cir. 1983).

ment Opportunity Commission, 458 U.S. 219 (1982), three women employees applied for positions as "picker-packers" at Ford's warehouse in Charlotte, N.C. At the time, no woman had ever worked in that capacity at the Ford warehouse. Significantly, all three women were qualified for the positions; however, Ford filled the three vacant positions with men. The EEOC offered proof "showing that Ford had never hired women into the warehouse until November, 1972, and that [its] procedures for hiring were vague and were based on highly subjective criteria." 73 L.Ed.2d at 728, n.7. The Court analyzed the case according to the disparate treatment framework, finding that: [W]e are persuaded, however, that the District Court's findings were consistent with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981)." 73 L.Ed.2d at 728, n.7[7] *See also, Cooper v.*

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[7] Contrary to this Court's decisions in **Ford Motor Company v. EEOC, supra**, and **Burdine, supra**, the Opinion below erroneously equated the instant case with the situation in **Hung Ping Wang v. Hoffman**, 694 F.2d 1146 (9th Cir. 1982). Wang challenged a promotion system whereby Wang's supervisors or the members of a selection panel could manipulate the criteria for promotion and the weighting system in order to eliminate certain candidates. Wang had always been eliminated from consideration at the first step of the process. Specifically, the court recognized that a disparate impact case might be made out by Wang's allegation that a "language skills" requirement was added specifically to disadvantage him, and that such requirement was the type of barrier which seems to have a disparate impact on minority applicants. 694 F.2d at 1146. Lasso failed to show that he or any other Hispanic was eliminated from consideration, any "manipulation" of criteria by Woodmen, or any "requirements" or "weighting system" which rendered Lasso ineligible for the position of state manager. **Compare, Pouncy v. Prudential Ins. Co. of America**, 668 F.2d 795 (5th Cir. 1982) ("None of the three Prudential 'employment practices' singled out by the appellant — the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria — are akin to the 'facially neutral employment practices' the disparate impact model was designed to test. Unlike educational requirements, aptitude tests, and the like, the practices identified by Pouncy are not selection procedures to which the disparate impact model traditionally has applied." 668 F.2d at 801); and, **Payne v. Travenol Laboratories, Inc.**, 673 F.2d 798 (5th Cir. 1982) ("Hiring processes that rely heavily on

Federal Reserve Bank of Richmond, 52 U.S.L.W. 4853 (6/26/84), wherein this Court reaffirmed the disparate treatment framework established by *McDonnell-Douglas*, and applied it to the claims of four Bank employees who alleged that each of them was the victim of employment discrimination based on race, and that the Bank had violated Title VII by engaging in "policies and practices" that included failing and refusing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees.

B. Evidence of only one alleged incident of discrimination against a single employee in a private, non-class action is insufficient to establish the required element of a "routine or regular" policy or practice of discrimination which must be proved by the plaintiff as a threshold matter in order to raise a disparate impact case.

The Opinion below misconstrued Lasso's statistical evidence as raising a claim of disparate impact. The Opinion below notes that Lasso introduced evidence, relating information from Woodmen's responses to interrogatories, showing that in 1977, Woodmen had 43.75% Spanish people working for the society in the State of New Mexico, and 41% in 1978. (App. A at 7). The Opinion further discusses Lasso's testimony that, since 1963, there has never been a Hispanic state manager in New Mexico. (*Ibid.*) This Court has recognized however, that a statistical showing of a disparity in the numbers of minorities in an employer's workforce does not, by itself, have the effect

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Footnote 7, cont'd.
subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case. . . . Subjecive discrimination in interviewing or in similar evaluation processes has been repeatedly held to fall into the disparate treatment branch of VII law." 673 F.2d at 817).

of putting before the Court all the necessary elements of a disparate impact case. To raise a disparate impact claim, an employee must, as a threshold matter, prove a facially neutral employment practice or requirement that operates in a discriminatory manner. (*See* Point IA, *infra*).

For the purposes of reviewing the Opinion below, it is important to remember the nature of the personnel action that Lasso is complaining about. The position of state manager could be filled only by one individual. The manager's job is an important one since the state manager is responsible for the society's activities in the state. In New Mexico, there had been only two state managers, Mr. VandeLine and Mr. Rigdon, in about a fourteen and one-half year period to the time Mr. Doney was picked to be state manager. (Tr. 176-177). (Tr. 279).

In filling the vacancy in 1977, Mr. Watkins, the National Field Manager, reviewed the company records (which showed the objective performances of the candidates and documented various adverse incidents involving Mr. Lasso - Tr. 244), and consulted with the outgoing state manager, several area managers in New Mexico and other personnel who had personal contact with the candidates. (Tr. 287, 313). Mr. Watkins considered Mr. Alfonso Trujillo, Mr. Lasso and Mr. Doney. (Tr. 235). When Mr. Trujillo indicated that he was not interested in the state manager's job, the choice became one between Lasso and Doney. (Tr. 272). After evaluating the two individuals and reviewing their relative qualities, Mr. Watkins picked Mr. Doney for a number of reasons which were directly related to job performance. Although Mr. Doney's sales record was less than Lasso's he was much better at managing people and had much better management experience. (Tr. 235-237). Watkins felt that Doney was a better leader, more tolerant

and more even-tempered. (Tr. 235-237). On the other hand, Lasso was perceived to be tempermental and more "self-centered." Lasso was observed to have difficulty with home office personnel and with his peers. (Tr. 235-237). Lasso was observed to be resistant to Woodmen's rules and did not like to follow orders. (Tr. 237).

The real issue tried to the District Court was the choice between Mr. Doney and Mr. Lasso. Indeed, Mr. Lasso testified at trial that up until Mr. Doney was chosen over him, he had never felt that he had been discriminated against, nor had Woodmen given him any reason to believe that he had been discriminated against. (Tr. 156). Mr. Lasso testified, not that any tests of employment qualifications or requirements denied *Hispanics* the opportunity to be promoted to state manager, but that *he* was not promoted because Mr. VandeLinde allegedly stated to him that New Mexico was not ready for a Hispanic state manager. (Tr. 111-112). The District Court found, however, that Lasso's allegation was not credible or supported by the evidence. (App. B at 13) (*See also* footnote 4, *infra*). Lasso's own testimony belies the fact that this is a classic challenge of disparate treatment.

The District Court in this case properly followed the allocation of the burdens and the order of presentation of proof established in *McDonnell-Douglas, supra,* wherein the Court decided the "critical issue" of "the order and allocation of proof in a *private, non-class* action challenging employment discrimination." 411 U.S. at 800. (Emphasis added). *McDonnell-Douglas* involved one individual complainant seeking to prove only one instance of unlawful discrimination against him. Likewise, Lasso brings this action on behalf of himself only. The only issue on appeal is whether Lasso was unlawfully discriminated against in

the one instance in which Mr. Doney was chosen as state manager over Lasso. *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207 (1981); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L.Ed.2d 721 (1982); *United States Postal Service Board of Governors v. Aikens*, . . U.S. . ., 75 L.Ed.2d 403 (1983).

The Tenth Circuit in *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981), held that "discriminatory impact cannot be established where you have just one isolated decision." 646 F.2d at 451. In *Coe*, a black employee alleged that he was not promoted because of his race. The Court found that:

> Plaintiff's allegations of discrimination generally do not fall within the categories of cases to which disparate impact analysis is applicable. There has not been an allegation that the company systematically followed a practice or procedure for hiring safety managers which is discriminatory in effect, nor does the evidence show that any such standard policy existed. In any event, *discriminatory impact cannot be established where you have just one isolated decision. A claim of discrimination resulting from the mode of filling a single position does not give rise to a disparate impact.* 646 F.2d at 451.
> (Emphasis added).

Even assuming Lasso's statistical evidence showed a disproportionately low number of Hispanics in the state manager's position, the Court should bear in mind that there is only one state manager's position in New Mexico and that there were only two individuals who held that position over a fourteen and one-half year period. (Tr. 176-177). There was no showing in the record that the subjective considerations used by Woodmen in selecting Mr. Doney over Mr. Lasso were employed systematically

over a period of years to exclude Hispanics or that such criteria "caused" or "resulted" in any statistical disparity. Indeed, the record below contains evidence of alleged discrimination in only one instance, when Mr. Doney was selected to be state manager instead of Mr. Lasso. This Court recognized in *Cooper v. Federal Reserve Bank of Richmond*, 52 USLW at 4856-57 (6/26/84), that evidence of two or three incidents of discrimination, buttressed by statistical evidence and expert testimony, was not sufficient to establish an inference of a general policy or a routine or regular practice of discrimination. As stated by the Court: "[A] piece of fruit may well be bruised without being rotten to the core." 52 USLW at 4857. *See also, Ste. Marie v. Eastern R. Ass'n.*, 650 F.2d 395, 405-06 (2d Cir. 1981), where the Court declared that the small number of incidents of discrimination in promotion over a period years "would be insufficient to support the inference of a routine or regular practice of discrimination;" and, *Goff v. Continental Oil Co.*, 678 F.2d 593, 597 (5th Cir. 1982), where the Court held that "even if all three witnesses' accounts of racial discrimination were true, this evidence would not have been enough to prove a pattern and practice of company-wide discrimination by Conoco."

In addition, the Tenth Circuit in *Coe, supra*, recognized that "the courts have consistently required that the statistical evidence submitted to prove employment discrimination bear a direct relationship to the specific charge that is being tried." 646 F.2d at 452. Lasso offered no evidence that any other Hispanic in Woodmen's workforce was ever discriminated against. No evidence was presented as to who was considered when other state manager positions were filled, or why Hispanics were not selected to fill the position. Moreover, the state manager's position involved skills not generally possessed or readily acquired by the

general population and Lasso failed to show that, at any given time when a state manager's position was filled, the "pool" of Hispanics in Woodmen's workforce possessed the requisite skills for the state manager's position. *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977). *See also, Colon-Sanchez v. Marsh*, 733 F.2d 78, 82 (10th Cir. 1984) (the plaintiff's statistics were not probative in that they did not reflect the number of "qualified" Hispanics competing for employment).

In short, Lasso's proof of only one instance of alleged discrimination is insufficient to establish the existence of a "routine or regular" policy or practice (neutral on its face) of discrimination which a plaintiff must prove as a threshold matter in order to raise a disparate impact case. Statistics showing a disparity in the number of Hispanics in the state manager's position, by themselves, cannot put before the Court all the required elements of a disparate impact case. Moreover, the statistics proffered by Lasso failed to relate to the alleged charge of discrimination in filling the state manager's position. The percentage of Hispanic persons in Woodmen's workforce does not prove anything in the absence of proof that there were X number of Hispanics who had the requisite skills and qualifications to be a state manager. Even assuming, *arguendo*, that the disparate impact model was properly put before the Court, it must be concluded that Lasso failed to prove a prima facie case of disparate impact.

C. The disparate treatment, not the disparate impact, allocation of burdens of proof has been applied by this Court in actions alleging a system-wide "Pattern or practice" of discrimination.

The Opinion below confuses the use of statistical evidence to prove a prima facie "pattern or practice" case

of disparate treatment with the use of statistics to prove that facially neutral employment practices have resulted in a disparate impact on minorities. Lasso's statistical proof, at best, showed a "pattern or practice" of employment discrimination by the employer. A pattern or practice disparate treatment case shares with a typical disparate impact suit the proof that an employer's practices have had a systemic adverse effect on members of a protected class. However, in "pattern or practice" cases, unlike disparate impact cases, the burden imposed on the employer to rebut the plaintiff's prima facie case is satisfied if the employer articulates some legitimate, nondiscriminatory reason for the employee's rejection. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 804-805 (1973). As stated by the Court in *McDonnell-Douglas*, "statistics as to petitioner's [employer's] employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." 411 U.S. at 805. Statistics can be helpful in that "we infer discriminatory animus because experience has shown that in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 579-580 (1978). But, the Court in *McDonnell-Douglas* cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." 411 U.S. at 805, n. 19.

Hazelwood, supra, is factually similar to this case and illustrates the use of statistics to prove a "pattern or

practice'' of disparate treatment. In *Hazelwood*, as in this case, the Hazelwood School District followed relatively unstructured procedures in hiring. Applicants were interviewed by a department chairman, program coordinator, or the principal at the school where the teaching vacancy existed. Each school principal possessed virtually unlimited discretion in hiring teachers for his school. The only general guidance given to the principals was to hire the ''most competent'' person available, and such intangibles as personality, disposition, appearance, poise, voice, articulation, and ability to deal with people ''counted heavily.'' 433 U.S. at 302. Specifically, the challenge in *Hazelwood* was supported by evidence of: (1) a history of alleged racially discriminatory practices, (2) statistical disparities in hiring, (3) the standardless and largely subjective hiring procedures, and (4) specific instances of alleged discrimination against 55 unsuccessful Negro applicants.[8]

This Court analyzed *Hazelwood* under the disparate treatment framework established by *McDonnell-Douglas*, finding that ''where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.'' 433 U.S. at 307. The Court concluded that the burden of the employer to rebut the plaintiff's prima facie proof is to ''articulate some legitimate, nondiscriminatory reason for the employee's rejection.'' 433 U.S. at 305, n. 9.

This Court in *Teamsters* likewise applied the disparate treatment analysis to a systemwide ''pattern or practice'' claim of discrimination. 431 U.S. at 357-358. The disparity in treatment allegedly involved ''the refusal to recruit, hire,

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[8] Lasso, in this case, produced no evidence showing any specific instances of alleged discrimination other than his own failure to be hired as state manager.

transfer, or promote minority group members on an equal basis with white people, particularly with respect to line-driving positions." 431 U.S. at 335. The Court noted that statistics can be an important source of proof in employment discrimination cases, since:

> "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." 431 U.S. at 340, n. 20.

The Court recognized that: "[C]laims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity. [cites omitted]." 431 U.S. at 335, n. 15. The Court held that where the focus is on a statistical pattern of discriminatory decision-making, the employer's burden is to prove a "nondiscriminatory explanation for the apparently discriminatory result". 431 U.S. at 361.

The District Court in this case properly found that Woodmen had provided legitimate non-discriminatory reasons for choosing Mr. Doney over Mr. Lasso.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment and the Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this . . day of November, 1984.

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The plaintiff, Carlos Lasso, brought this Title VII action, 42 U.S.C. § 2000(e) *et seq.*, against defendant Woodmen of the World Life Insurance Society. Plaintiff alleged that defendant failed to promote him because of his Hispanic heritage and demoted him for the same reason. The trial court rejected both arguments, and entered judgment dismissing the cause on the merits. Plaintiff appeals.

I

The Facts

In 1971 plaintiff began working for defendant as a life insurance salesman. In his first year, plaintiff became the "number one producer" in the State of New Mexico, and he was the most successful producer in New Mexico from 1971-73. II R.38, 42. Defendant desired that its employees be involved in fraternal activities, in addition to selling insurance. Plaintiff was highly successful in this area as well. He organized and directed one of the defendant's more active and successful fraternal lodges in New Mexico. II R.53-57, III R.257.

In 1973 defendant promoted plaintiff to an area manager position. In addition to selling insurance, an area manager's responsibilities include recruiting, training and supervising a sales force in his area. II R.58. Plaintiff proved to be a successful area manager. He doubled his area's production in one year, II R.69, and from 1974 through 1977 had the highest production in the state. III R.257-58. Moreover, two of plaintiff's recruits were the first million dollar producers in New Mexico. II R.66.

Plaintiff aspired to be state manager, but he did not learn that the position was open in 1977 until a replacement for the current state manager was announced. II R. 105-06, 108. Plaintiff discovered that he had been passed over for the state manager position on November 17, 1977, at a company social gathering. At this gathering, an announcement was made that the current state manager was being transferred, and his replacement was to be a caucasion — Grant Doney. II R.105-06.

Plaintiff believed that defendant chose not to promote him because of his Hispanic national origin and brought suit. The district court found that "Grant Doney had not been with [defendant] as long as [plaintiff] and did not have as good a record as an area manager as [plaintiff]." Trial Court Opinion at 4. At trial plaintiff introduced "statistical evidence . . . regarding the lack of Hispanics in management." *Id.* at 3. The district court found that this, coupled with plaintiff's qualifications and national origin, made out a prima facie case of disparate treatment. *See McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973); Trial Court Opinion at 3-4.

However, the district court concluded that plaintiff had failed to carry his burden of proof. The court reasoned that defendant had "articulated non-discriminatory reasons for not choosing [plaintiff]." Trial Court Opinion at 4. Specifically, the court found that defendant believed that Doney had more management experience and that his personality and leadership skills made him a more desirable choice than plaintiff. *Id.* Because plaintiff did not demonstrate that these reasons were a mere pretext for discrimination, he failed to prove a Title VII violation. *Id.*

The court further found that defendant's refusal to permit plaintiff to continue as area manager after Doney's promotion did not violate Title VII. The court reasoned that plaintiff had not proven a prima facie case on this claim, and even if he had, defendant's reasons for demoting plaintiff were legitimate and non-discriminatory. The

court, therefore, dismissed the action on the merits. *Id.* at 5.

On appeal, plaintiff does not challenge the trial court's ruling on the disparate treatment issue. Rather, he argues that the trial court failed to make findings on his disparate impact theory. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Plaintiff reasons that the trial court's findings are therefore insufficient under Rule 52, Fed. R. Civ. P.; *See* Brief for the Appellant at 10 ("It is from [the court's disregard of the disparate impact theory] that the appellant here appeals."). Plaintiff seeks to have this case "reversed on the basis of his having shown disparate impact and the employer's having failed to prove business necessity; or remanded for consideration of his second cause of action — disparate impact." *Id.* at 11-12.

II

At the outset we will note the three basic issues presented by the contentions of the parties:

a. Plaintiff asserts, and defendant denies, that plaintiff urged a disparate impact theory in the trial court.

b. Plaintiff asserts, and defendant denies, that a disparate impact claim may be maintained in a private, non-class action. Defendant argues that the plaintiff is attempting to "force the factual circumstances of this case into the non-private, class action analysis set forth in *Griggs*, 401 U.S. 424 (1971)," and defendant criticizes plaintiff's position in that "[w]ithout exception, the cases cited by Lasso were brought as non-private, class actions." Brief for the Appellee 12-13.

c. Plaintiff argues, and defendant denies, that the trial court erred in not making findings and conclusions dealing with the disparate impact claim and statistical and other evidence introduced in support of that claim.

A.

We are persuaded that, although the pleadings and statements of plaintiff's claims in the pretrial order do not with clarity emphasize a "disparate impact" claim, the essence of that theory was presented. In the pretrial order the general nature of plaintiff's claims included statements that defendant "discriminatorily failed and refused to hire the plaintiff as state manager because of his national origin." It also said that plaintiff "further contends that Defendant has intentionally engaged in discriminatory action against Hispanics and that they have been denied opportunities equal to those provided to Anglos,"[1] and plaintiff prayed for an injunction "prohibiting the Defendant from any future discriminatory employment practices because of national origin and that the Defendant be required to institute and carry out policies which provide equal employment opportunities for Hispanics." The pretrial order further noted as a contested fact question "[w]hether or not the Defendant has engaged in discriminatory practices in the hiring and employment of Hispanics." I R. 12-13.

We also consider the complaint in conjunction with the general statement of claims noted in the pretrial order.

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[1] The allegation of "discriminatory action" does pertain to disparate treatment claims and disparate impact claims do not require such intentional wrongs. **Williams v. Colorado Springs, Colorado, School District**, 641 F.2d 835, 839 (10th Cir. 1981). We do not feel, however, that this addition of the allegation of intent removes all of the charges from the realm of disparate impact claims.

While intentional discrimination need not be shown in disparate impact cases, intent is not irrelevant; after the employer presents his defense attempting to show that the challenged facially neutral practice has a manifest relationship to the employment in question, "the plaintiff may prevail if he shows that **the employer was using the practice as a mere pretext for discrimination.**" **Connecticut v. Teal**, 457 U.S. 440, 447 (1982) (emphasis added). As in **Hung Ping Wang v. Hoffman**, 694 F.2d 1146, 1147 (9th Cir. 1982), the instant case "is both a disparate impact and a disparate treatment case under Title VII." (case remanded for reconsideration of disparate impact claim where plaintiff claimed predominantly subjective criteria for promotions in government jobs, with inadequate objective guidelines, permitted discriminatory impact on minority groups).

We must agree with plaintiff that the effect of paragraphs 6 and 7 is to allege both disparate treatment and disparate impact claims.[2] In addition we note that two days before trial, plaintiff's first set of requested findings of fact and conclusions of law was filed with the trial court. I R. 27-34. Those proposed findings and conclusions included statistical data, cited from answers to interrogatories, showing, inter alia, that there was only one Hispanic surnamed state manager of defendant company since 1963 and that out of 55 state managers since 1975, none were Hispanic surnamed persons. I R. 29-30. One proposed finding, to be based on Lasso's testimony, was that there is a substantial disparity between the number of Hispanics working for defendant and those holding high level management positions. *Id.* at 31. Proposed conclusion of law 37 stated that the failure of defendant to hire Hispanics in high level management positions was not "based upon some manifest relationship to the employment here in question and *is not based upon any legitimate business necessity,*" *Id.* at 32 (emphais added) - the latter point being directly relevant to a disparate impact theory. When disparate impact claims are under consideration, "[t]he touchstone is business necessity." *Griggs v. Duke Power Co., supra*, 401 U.S. at 431;

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[2] Paragraphs 6 and 7 of the complaint read as follows:

6. This suit is based on the charge filed by Plaintiff with the Equal Employment Opportunity Commission and the Commission having found reasonable cause to believe that the Defendant had discriminatorily failed and refused to hire Carlos A. Lasso as District Manager because of his national origin. This practice, which defendant has intentionally engaged in [sic] its New Mexico facilities, discriminates aganst Hispanics on the basis of their national origin in violation of Section 703 of Title VII, 42 U.S.C. Section 2000e-2. This practice includes, but is not limited to, the following:

A. Maintaining policies and practices with respect to hiring, specifically, in failing to hire Plaintiff as a District Manager. These policies unlawfully operate to deny Hispanics opportunities equal to those provided whites.

7. The effect of the policies and practices complained of above has been to deprive Hispanics of equal employment opportunities and otherwise adversely affect their status as employees because of their national origin.

Williams v. Colorado Springs, Colorado, School District, supra, 641 F.2d at 842 (standard applicable to disparate impact claims is "the more exacting 'business necessity' standard established in *Griggs*").

In sum we must agree that plaintiff did present the disparate impact theory in the trial court. *See Hung Ping Wang v. Hoffman, supra*, 694 F.2d at 1148-49.

B.

We are not persuaded by defendant's argument that a disparate impact claim may not be asserted in a private, non-class action. We are convinced that a plaintiff like Lasso may assert such a Title VII claim in a case like this.

In *Rule v. International Association of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 566 (8th Cir. 1978), a Title VII class suit was brought but was treated at trial as one involving individual claims. The Eighth Circuit held that the district court applied the wrong standard of proof from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), instead of that from *Griggs*, which was proper for a disparate impact case. The court of appeals stated that "[w]hen such a challenge is made, in either an individual suit or a class action, the claim should be judged according to the standards set forth in *Griggs*." *Rule, supra*, 568 F.2d at 566. Moreover in *Connecticut v. Teal*, 457 U.S. 440, 455-56 (1982), the Supreme Court stated that "[e]very *individual* employee is protected against both discriminatory treatment and practices that are fair in form, but discriminatory in operation.'" (emphasis in original) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431)1971)). *See also* 3 A. Larson & L. Larson, *Employment Discrimination* § 80.00 (1984) (discussing problems that arise in deciding upon relief in individual disparate impact cases).

In sum, we must reject defendant's contention and we hold instead that an individual plaintiff, like Lasso, may maintain a disparate impact claim.

C.

In light of our conclusion that plaintiff did assert a disparate impact claim in the trial court as well as a disparate treatment claim, *see* Part II A, *supra*, and the evidence offered which tended to support such a disparate impact claim, we must agree that the trial court's findings and conclusions are deficient.

Defendant argues that the court properly weighed the statistical evidence; that the evidence was rather shallow and inconclusive, and came from discovery from defendant's responses to interrogatories; that no expert witness was produced to analyze the statistical data and no evidence on population figures was introduced; and thus there was no error in the findings and conclusions in connection with the disparate impact claim. Brief for the Appellee 22.

We cannot agree. There was statistical evidence in some detail on the number of lower level Hispanics among the defendant's employees and the lack of high level Hispanics state managers, and on the subjective selection process. Among other things, evidence introduced by plaintiff included Lasso's testimony, relating information from defendant's responses to interrogatories, that defendant in 1977 had 43.75% Spanish people working for the company in the State of New Mexico. In 1978, 41% of the New Mexico work force of the company were Hispanics. He testified further that there has never been a Hispanic state manager for the company, which has operated in the State for perhaps some 25 years. II R. 97-98.

Then with respect to standards used by defendant in the selection of state managers, there was the testimony of Mr. Watkins. He was the National Field Manager, a member of the Board, and a vice-president of defendant. III R. 226. He summarized the factors considered by the company in the selection of State managers — leadership ability, getting along with the person's peers, and the person's experience background. He said that there had

been one Hispanic state manager, Mr. Rozas in Arizona, who resigned about 1965. *Id.* at 232-34. Watkins was the person who recommended Doney for the State Manager's position in this instance.

It is true that trial judge's findings and conclusions did discuss the statistical data. They stated that the "qualifications of Mr. Lasso, the national origin of Mr. Lasso and the statistical evidence offered at the trial regarding the lack of Hispanics in management give rise to an inference of an unlawful discriminatory act by the Society in choosing Grant Doney for the position of state manager. Mr. Lasso, therefore, established a *prima facie* case of disparate treatment because of his national origin." Trial Court Opinion at 4. Then following the *McDonnell Douglas Corp. v. Green* analysis, the judge found that defendant articulated non-discriminatory reasons for not choosing Mr. Lasso for state manager and that the "plaintiff did not carry his burden of proving that the reasons offered by the defendant were merely a pretext for discrimination." Trial Court Opinion at 4.

We must agree that the findings were deficient in not treating the disparate impact claim. There is no discussion in the court's opinion which can fairly be read as having considered that claim. The rejection of plaintiff's case gave no consideration to "the more exacting 'business necessity' standard established in *Griggs*" which is applied in judging a defense to a disparate impact claim. *Williams v. Colorado Springs, Colorado School District, supra,* 641 F.2d at 842; *see also EEOC v. St. Louis-San Francisco Railway Co., now Burlington Northern Railroad Company,* __ F.2d __, __ (10th Cir. Nos. 83-1072 and 1127, 7/13/84, slip op. at 6). Without expressing any view as to the merits of the disparate impact claim or the findings and conclusions that should be made on it, we hold that the district court did err in not making findings and conclusions on that claim as required by Fed. R. Civ. P. 52(a).

III

For these reasons we conclude that we must vacate the judgment and remand the case. The judgment is vacated and the case is remanded for further proceedings which the district court deems proper for disposition of the disparate impact claim, and for further findings and conclusions and a further judgment.

In The United States District Court For The District of New Mexico

CARLOS A. LASSO, *Plaintiff*,
v.
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, *Defendant*.
) No. 80-136-M Civil

MEMORANDUM OPINION AND ORDER

The plaintiff, Carlos Lasso, has brought this case against the defendant, Woodmen of the World Life Insurance Society, (the Society), alleging it has committed unlawful employment practices in violation of Title VII, 42 U.S.C. §2000e *et seq.* The Court has jurisdiction over the parties and the subject matter. A bench trial was held in this matter beginning January 14, 1981. The following shall constitute my Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Carlos Lasso is an Hispanic surnamed individual of South American origin. He was under contract as a field representative of the defendant from March 1971 to July 1973. He was a very successful field representative and was the number one field representative in New Mexico in 1971 and 1972. From July 1973 to January 1978, Mr. Lasso was under contract as an area manager of the defendant. As an area manager he had an excellent record as far as persistency, premiums and area production volume. These are the factors used by the Society to judge the performance of area managers. He received several awards as an area

manager. Mr. Lasso was also very active in promoting fraternal activities of the Society. He recruited and trained several successful field representatives.

An opening for state manager of the Society occurred in 1977. Grant Doney was chosen by the Society to fill that position. Mr. Doney had served as a part-time field representative in 1973 and 1974 and as a full-time field representative for the Society from April 1975 to October 1975. He had been an area manager of the defendant from October 1975 until he was made state manager. As an area manager, Mr. Doney had a successful record, although his record as far as persistency, premiums and area production volume was less impressive than Carlos Lasso's record.

Mr. Lasso alleges that the defendant did not hire him as state manager because of his national origin and that this action was in violation of Title VII. The defendant alleges that Title VII is not applicable to this situation because Mr. Lasso was not a person that Title VII protects. I find that Title VII does apply because Mr. Lasso was an employee of the defendant for purposes of Title VII. The defendant further alleges that it had legitimate business reasons for choosing Mr. Doney over Mr. Lasso for the position of state manager. Shortly after Mr. Doney became state manager, Mr. Lasso was made a field representative rather than being allowed to continue as an area manager. He alleges that this change in his status with the Society was also in violation of Title VII.

The plaintiff in a Title VII case initially has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. If the plaintiff succeeds in proving a *prima facie* case, the burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the employee's rejection. If the defendant carries this burden, the plaintiff must then prove by a preponderence of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for

discrimination. *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973).

At the trial in January, Mr. Lasso established a *prima facie* case of disparate treatment. When the Society did not choose him for the state manager position its action gave rise to an inference of unlawful discrimination. Normally, in order to carry that burden, a plaintiff must prove by a preponderance of the evidence that he applied for an available position for which he was qualified, but was rejected under circumstances giving rise to an inference of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 49 U.S.L.W. 4214. Although Mr. Lasso did not formally apply for the position of state manager, it was known within the Society that he desired that position. He did not formally apply for the position because he was not made aware of the fact that an opening would be occurring. The qualifications of Mr. Lasso, the national origin of Mr. Lasso and the statistical evidence offered at the trial regarding the lack of Hispanics in management give rise to an inference of an unlawful discriminatory act by the Society in choosing Grant Doney for the position of state manager. Mr. Lasso, therefore, established a *prima facie* case of disparate treatment because of his national origin.

The defendant's evidence raised a genuine issue of fact as to whether it discriminated against the plaintiff. The defendant offered evidence of its non-discriminatory reasons for choosing Grant Doney rather than the plaintiff for the position of state manager. The Society articulated non-discriminatory reasons for not choosing Mr. Lasso. It is true that Grant Doney had not been with the Society as long as Mr. Lasso and did not have as good a record as an area manager as Mr. Lasso. Prior to working for the Society, Mr. Doney had much more managerial and personnel experience than Mr. Lasso had with the Society or elsewhere. The executives of the Society also felt that Mr. Doney's personality compared to Mr. Lasso's personality, was better suited for the state manager's position. They

felt Mr. Doney possessed leadership qualities and managerial skills which Mr. Lasso lacked. Consequently, the Society offered the state manager position to Mr. Doney.

The plaintiff did not carry his burden of proving that the reasons offered by the defendant were merely a pretext for discrimination. He did not show that a discriminatory reason more likely motivated the Society or that the Society's proffered explanation was unworthy of credence. Absent such a showing, he has not proved that the Society acted in violation of Title VII by not choosing him as state manager. *Texas Dept. of Community Affairs v. Burdine*, 49 U.S.L.W. at 4216.

Mr. Lasso has also alleged that the Society's refusal to allow him to continue as an area manager after Mr. Doney's appointment to the state manager position was in violation of Title VII. I find that the Society did not act in a discriminatory fashion in so acting. Mr. Lasso's actions after Mr. Doney was appointed state manager justified the Society's belief that he may not work out as an area manager under Mr. Doney. The Society also felt that Mr. Lasso had been an excellent field representative and perhaps he should get out of a management position at least for awhile. The action by the Society under the circumstances does not give rise to an inference of unlawful discrimination. Plaintiff has failed to prove by a preponderance of the evidence his *prima facie* case on this claim. Even if he had presented sufficient evidence to prove his *prima facie* case, the reasons offered by the defendant for removing Mr. Lasso from the area manager's position were legitimate and non-discriminatory and plaintiff failed to prove that they were a mere pretext for discrimination. Now, Therefore,

IT IS ORDERED that plaintiff's cause of action shall be, and hereby is, dismissed on the merits.

Appendix C

Section 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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No. 84-821

In The
Supreme Court of the United States
October Term, 1984

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Petitioner,

v.

CARLOS A. LASSO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

I. Whether the opinion below conflicts with decisions of this Court in requiring the employer to satisfy the more exacting "business necessity" burden of proof imposed in disparate impact cases, in an action by a single employee alleging discriminatory employment practices by the employer in filling a state manager's position (the promotion of one qualified employee rather than another qualified employee), but not challenging any facially neutral employment practices, tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities, in that:

A. The disparate impact allocation of burdens of proof has been applied by this Court only in cases where there was a challenge to facially neutral employment tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities, whereas the challenge in this case is to the employer's evaluation of the relative qualifications of two qualified employees and its decision to promote one qualified employee instead of another qualified employee;

B. Evidence of only one alleged incident of discrimination against a single employee in a private non class action is insufficient to establish a "routine or regular" policy or practice of discrimination, which is a required element of a disparate impact case and which must be proved by the plaintiff as a threshold matter;

C. The disparate treatment, not the disparate impact, allocation of burdens of proof has been applied by this Court in actions alleging a systemwide "pattern or practice" of discrimination.

RESPONDENT'S REFORMULATION OF THE ISSUES PRESENTED

Respondent respectfully submits that an analysis following the formulation of the issues submitted by Petitioner may not serve the interests of clarity. Therefore, Respondent respectfully submits his argument under the following, abbreviated, framework.

Where the employer filled a state manager's position involving: (1) the promotion of one qualified employee rather than another qualified employee, and (2) an adverse statistical impact in filling that position over a large number of decisions and a long period of time; did the opinion below conflict with decisions of this Court in its treatment of the following issues:

I. Can an individual employee, in a non-class action base his claim on the disparate impact theory?

II. Is a subjective selection process which creates a statistical disparity, when used to determine promotions, a "facially neutral" mechanism within the meaning of the disparate impact cause of action?

III. Where a subjective process denies an employee a promotion, is that a "routine and regular" policy where said process has been used more than 55 times by employer in the relevant time frame?

IV. As a matter of fact, did Respondent in the instant case present a disparate impact case, or a pattern and practice case?

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OPINIONS BELOW

The Opinion of the Court of Appeals vacating the order of the District Court (Pet. App. A1-A9), is reported at 741 F.2d 1241 (10th Cir. 1984). The transcript of the district court trial before the Honorable Edwin Mechem will be cited as Tr., and the Petition for Writ of Certiorari with its Appendix will be cited as Pet. and Pet. App., respectively.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete and inaccurate at several relevant points. First, petitioner characterizes itself as a "private fraternal benefit society engaged in fraternal activities and also the sale of insurance as an incident of such activities." Pet. at 3. This assertion is a remnant of a failed tactic, attempted at trial to veil Petitioner in the protective cloaks of a private club. The reality is that Petitioner sells insurance, has as its main purpose the sale of insurance, and if its sales meetings can be characterized as "fraternal activities", they are used ultimately to secure the sale of insurance.

Second, is the statement that "in the fall of 1977, a vacancy was about to occur in the state manager's position in New Mexico." Pet. 3. Respondent asks the court to note that this does not read either that "a position came open," or that "the process for selection of a state manager was announced." Although Respondent had stated his interest in a state manager's position, no announcement of the impending opening or any other state manager position

was ever made—Respondent was never informed of when there would be a selection. Tr. at 105, 161, 318. Nor did *anyone* know what the selection criteria would be. Tr. at 149, 167.

Finally, is the incredible assertion that:

> *No evidence was presented to show that any facially neutral tests for employment, aptitude or qualification, or any particularized requirements or standards for promotion were used by Woodmen to deny Hispanics the opportunity for promotion. No evidence was introduced as to any specific instance of discrimination* against any other employee save the isolated decision to make Doney state manager instead of Lasso. *No employment practice was singled out by Lasso as having been routinely or regularly used by Woodmen to deprive Hispanics of opportunities, or which caused any disparities in Woodmen's workforce.*

Pet. at 6 (*Emphasis Added*).

This statement highlights the attempt of the Petitioner to ignore the facts as found by the trial court—those facts upon which the Court of Appeals based its decision. Pet. App. at A7. Although testimony at trial was that "the only thing (company officials) did not come out and say was, we do not want this mexican running for the president of the state for Woodmen of the World," for the purpose of this petition, it must be "assumed" that the selection process for state manager was "neutral". The Court of Appeals stated that:

> there was only one hispanic surnamed state manager of defendant company since 1963 and that out of 55 state managers since 1975, none were Hispanic surnamed persons. I.R. 29-30. One proposed finding, to be based on Lasso's testimony, was that there is a sub-

> stantial disparity between the number of Hispanics working for defendant and those holding high level management positions.

Pet. App. at A5. The Tenth Circuit further stated:

> There was statistical evidence in some detail on the number of lower level Hispanics among the defendant's employees and the lack of high level Hispanics state managers, and on the subjective selection process. Among other things, evidence introduced by plaintiff . . . that defendant in 1977 had 43.75% Spanish people working for the company in the State of New Mexico. In 1978, 41% of the New Mexico work force of the company, which has operated in the State for perhaps some 25 years.

Pet. App. at A7.

This is in keeping with the finding of the district court below that:

> the national origin of Mr. Lasso and the statistical evidence offered at trial regarding the lack of Hispanics in management give rise to an inference of an unlawful discriminatory act by the Society.

Pet. App. at A12.

Thus, the correct characterization of the facts is directly opposed to that presented by Petitioner. The facially neutral selection process for state manager was used by Woodmen to deny Hispanics the opportunity for promotion. Although evidence of a great number of specific instances of discrimination were *factually before the trial court,* the employment practice singled out by Lasso as having routinely and regularly used by Woodmen to deprive Hispanics of opportunities and which caused disparities in Woodmen's workforce was the facially neutral, subjective, non-criteria based selection process for state

managers which was utilized some 55 times by Petitioner in the relevant time frame.

GROUNDS FOR DENIAL OF PETITION

Prior to presenting his argument on the merits of the Petition, Respondent respectfully submits that no basis exists for a grant of the Writ of Certiorari as to the decision of the Tenth Circuit below. As will be shown below, there exists no contradictory opinion within the Tenth Circuit, nor does there exist a split between the Circuits on the issues presented. Finally, no issue is raised in the interpretation of the statute on any point not decided by unanimous Circuits.

I. Can An Individual In A Non-Class Action Employee Base His Claim On The Disparate Impact Theory?

A. The distinction between the causes of action under Title VII

The interpretations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, by this Court, delimit two essential causes of action; disparate impact and disparate treatment. (Pattern and practice of discrimination being a conceptual subset of the disparate treatment action due to the allocation of proof therein.) Of these two, only the disparate impact theory, articulated in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), does not ultimately place the burden on the employee to demonstrate discriminatory intent.

> (G)ood intent or absence of discriminatory intent does not redeem employment procedures or testing

> mechanisms that operate as "built-in headwinds" for minority groups, and are related to measuring job capability.

Id. at 432. This manifests itself, in the trial of an employment discrimination action in a very distinct difference in allocation of proof. Simply put, if an employee seeks only to prove that an action by the employer was intentional discrimination that either injured him (disparate treatment), or that a series of intentional actions injured a group of people (pattern and practice) the burdens and allocation of proof are set forth in *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973), *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) as being:

1. Plaintiff's proof of the Prima Facie case.
2. Employer's articulation of a legitimate non-discriminatory reason for the action.
3. Plaintiff's demonstration that the articulated reason is pretextual.

If, however, the employee alleges that a "built-in headwind" in the selection process has adversely affected a minority group disproportionately, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. *Griggs v. Duke Power Co., supra* at 432.

This, in the course of trial, alters the burden of going forward with proof. Once the prima facie case has been made, the employer must come forward with more than a mere "articulation" of the reason for the disproportion-

ate effect of the employment procedure—he must demonstrate the manifest relationship, or the business necessity, for retention of the offending procedure. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

B. Election of cause of action

It is a well founded basis of modern fact pleading that a plaintiff may plead alternate, and even conflicting theories of his case. Fed.R.Civ.P. 8(e) (2). In a Title VII action it is not uncommon to find a factual situation in which both disparate impact and disparate treatment have occurred. Consider *Wright v. National Archives & Records Service,* 609 F.2d 702 (4th Cir. 1979) in which an individual sought relief under both theories, and the court clearly spoke to the point. In an action by a single black plaintiff, the court's analysis parallels the treatment of other Courts of Appeal under similar circumstances.

> It is necessary at the outset to identify the particular actions claimed by Wright to be discriminatory and to clarify the appropriate mode of legal analysis to be applied in assessing the claims.
>
> • • •
>
> There has also been some confusion as to whether the claims are properly to be analyzed under the disparate treatment test of *McDonnell Douglas* (citation omitted) or under the "disparate impact" test of *Griggs* (citation omitted), or under both.
>
> If any doubt has existed about the appropriate way to assess Title VII claims that seek to invoke both "disparate treatment" and "disparate impact" theories as alternative grounds for relief, *Furnco Con-*

> *struction Corp v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), decided during the pendency of this appeal, has made it clear through the mode of analysis employed in that case that these are rightly treated simply as alternative theories upon which a right to relief under Title VII may be established in a given case. As such, in keeping with the general rules of civil procedure, they may be properly pleaded. Fed.R.Civ.P. 8(e) (2), and if sufficiently supported by evidence, Fed.R.Civ.P. 41(b), analyzed by the trier of fact as alternative grounds of relief. Obviously, as alternative theories and not separate claims they may not be applied to establish multiple violations on the same facts, but short of this no procedural election between them is required of a claimant at either pre-trial, trial, or appellate stages.

See also, Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980); *Chrisner v. Complete Auto Transit, Inc.,* 645 F.2d 1251 (6th Cir. 1981); *Rowe v. Cleveland Pneumatic Co., Numerical Control,* 690 F.2d 88 (6th Cir. 1982); *Wright v. Olin Corp.,* 697 F.2d 1172 (4th Cir. 1982); *Wright v. National Archives & Records Service,* 609 F.2d 702 (4th Cir. 1979).

A hypothetical will clarify the logical basis of this position.

> Mary Smith, a woman seeks employment with ABC. ABC has advertised a job for which Mary is qualified. ABC foreman states to Mary "we ain't ever hired a woman here, and we ain't going to." Mary is rejected for the position. Mary, believing that she may be unable to prove the existence of the foreman's statement makes disparate impact part of her complaint. She does so because she believes that she, as an individual has suffered injury as a member of an affected class. She does not bring it as a class action because she cannot afford to.

> Mary, also believing that company interference with employment records may make it impossible to prove statistical impact on her minority group through the subjective hiring process, (and because her lawyer informs her of the high potential cost of the impact action), also pleads a case of disparate treatment on the basis of the overt statement of the foreman. She also does this because she feels that if she can convince the court of the *intent* to discriminate, her chances of a large back-pay award, which is discretionary, is enhanced by the showing of animus.

In this section of its Petition, Woodmen seems to argue that because Mary argued disparate treatment, she could not have been injured by simultaneous disparate impact as the member of an adversely affected group. If this is the case, we must pity Mary should she suffer any of a number of fates which would deny her access to a class action—for the effect of such a denial would leave her with an injury but no remedy. She could lack the funds for a class action. She could be found to lack either commonality or typicality, or she could be unable to provide adequate protection for the class through her representation. In any of these cases, lacking the ability to bring the class action, she would be unable to seek redress for even the most heinous and overt disparate impact.

From whence does Petitioner's position spring? Certainly not from any decision of this Court or any other. To the contrary, in *Hung Ping Wang v. Hoffman,* 694 F.2d 1146 (9th Cir. 1982) the court stated

> This is *both a disparate impact and a disparate treatment case under Title VII, 42 U.S.C. § 2000e et seq.* First, Wang contends that the promotion selection process permitted a discriminatory impact on minority groups because it is predominantly subjective and

> provides inadequate objective guidelines. Second, Wang contends that application of the selection process to him resulted in discriminatory treatment.

Id. at 1147. (*Emphasis Added*). In that action, the Ninth Circuit, as did the Tenth Circuit in the instant case, first analyzed the impact claim and then the treatment claim, and in finding that each had merit independent of the other, admonished the district court.

> The district court apparently analyzed all of Wang's claims as if they alleged only disparities in treatment. The problems inherent in this approach are readily apparent.

Id. at 1148. The court went on to explain that:

> The district court found that Wang had established a prima facie case of discriminatory treatment under McDonnell Douglas. Under this analysis, the burden then shifted to the Corps to articulate legitimate, non-discriminatory reasons for its failure to promote Wang. The Corps gave two reasons for its actions:
>
> (1) Wang did not qualify under the corps' selection process; and (2) Wang did not possess the requisite language skills. The district court found that the latter rational, lack of language skills, was a pretext.[2]
>
> In analyzing the first rationale, the court assigned to Wang the burden of proving that but for the discrimination he would have been promoted. This is wrong. Wang is challenging the legitimacy of the selection system itself. He cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of that system is first established. Nor can the plaintiff be required to reconstruct a valid selection system and demonstrate that under third system he would have received one or more of the promotions at issue. The discriminatory impact of the selection system must

> therefore be resolved before Wang's treatment claims are addressed.
>
> • • •
>
> Because the district court assigned an improper burden to Wang on his disparate impact claim, it is impossible to ascertain from the record before us whether Wang proved either disparate impact or disparate treatment by the Corps.

Id. at 1149. As the 10th Circuit stated below:

> [P]laintiff does not challenge the trial court's ruling on the disparate treatment issue. Rather, he argues that the trial court failed to make findings on his disparate impact theory.
>
> • • •
>
> We must agree with plaintiff that the effect of paragraphs 6 and 7 is to allege both disparate treatment and disparate impact claims.

Pet. at A4-5.

In a decision that is almost identical in procedural background to the case at bar, *Rowe v. Cleveland Pneumatic Co., Numerical Control, supra,* the appellate court dealt with an almost identical confusion at the district court level.

> Either theory may be applied to a particular set of facts. Thus, they merely represent alternative foundations upon which liability may be premised. As such they both may be properly pleaded in a plaintiff's complaint, *see,* Fed.R.Civ.P. 8(e) (2) . . . . Moreover, a plaintiff relying on both theories need not elect between them either before or after trial
>
> • • •
>
> The employer thereby delegated the employment decision, as to this group of applicants, to the foreman

> for their subjective evaluations. This Court has previously noted the problems inherent in selection procedures which rely solely upon the subjective evaluations of all white supervisory personnel. (*Citations omitted*). While such procedures are not *per se* violative of Title VII, (*citation omitted*), they do provide a ready mechanism for discrimination, permitting racial prejudice to affect and often control promotion and hiring decisions. (*Citations omitted*). While we recognize that, in some circumstances, employment decisions may be made on the basis of such subjective criteria, any *procedure employing such subjective evaluations will be carefully scrutinized in order to prevent abuse.*

Id. at 92-3.

Thus, Respondent raised both causes of action at trial, and the disparate impact action was properly before the court as a challenge to a facially neutral employment selection process which has an adverse effect on Respondent's minority group.

In *Cooper et al. v. Federal Reserve Bank of Richmond,* — U.S. —, 52 L.W. 4853, (No. 83-185, 1984) this Court's analytical model implies the view that Plaintiffs could elect either or both theories. In that case, intervenors (plaintiffs) were found to have had their claims of pattern and practice resolved in a class action. The court ruled, however, that that decision was not dispositive on the "individual cases". *Id.* at 52 L.W. 4857. Thus, those plaintiffs could have elected either, or both, actions.

C. Having raised disparate impact as an alternative theory an individual need not use the class-action procedure

Petitioner repeatedly, both in this petition and in its appeal to the 10th Circuit, uses the terms "single em-

ployee", "private", and "non-class" as talismen to ward away Respondent's disparate impact claim. When read carefully, these distinctions may be reduced to two misconceptions regarding the statistical case, plus an attempt to argue the facts of this case before an inappropriate forum.

Apparently relying on a theory advanced by the dissenting judge (a district court judge, sitting by designation) in *Hung Ping Wang, supra,* Petitioner seeks to convince this court that

> (individuals should not be allowed to bring disparate impact actions because) This approach, which treats the element of intent as irrelevant, has heretofore been reserved for those situations in which "a business practice, neutral on its face, is shown to have a substantial, adverse impact on some group protected by Title VII", e.g., *Gay v. Waiters' & Dairy Lunchmen's Union,* 694 F.2d 531, 537 (9th Cir. 1982) emphasis added." Application of such analysis where only a single individual is involved is not likely to enhance stability in an area of law already fraught with uncertainty.

Id. at 694 F.2d 1149.

This analysis is simply the confusion of a class injury and the procedural mechanism for bringing a class complaint. *Rowe, supra.* Petitioner would overturn a long line of actions in which an individual or a small group of individuals brought suit on the disparate impact theory due to their injury as part of an affected minority group. *Chrisner v. Complete Auto Transit, Inc.,* 645 F.2d 1251 (6th Cir. 1981); *Rowe v. Cleveland Pneumatic Co., Numerical Control,* 690 F.2d 88 (6th Cir. 1982); *Wright v. Olin Corp.,* 697 F.2d 1172 (4th Cir. 1982); *Wright v. National*

Archives & Records Service, 609 F.2d 702 (4th Cir. 1979); *see also, Solo Cup Co. v. Federal Ins. Co.,* 619 F.2d 1178 (7th Cir. 1980), *and* 3 A. Larson & L. Larson, Employment Discrimination 80.00 (1984) (discussing problems that arise in deciding upon relief in individual disparate impact cases). The net effect of this would be to create the *only* cause of action in the American legal system which would *require* a specific procedural mechanism—the class action—to be used. Thus, the element of "class action" would be added to the cause of action.

Are we to understand then, that if an individual is a businessman whose competitor engages in anti-trust violations he must bring a class action because he is injured along with others; and what of a person injured by the acts of a consumer fraud operation, must he wait for a governmental agency to file a class action on his behalf? This position is patently absurd.

Petitioner would limit the use of the disparate impact action to non-private (read governmental), class action. This is clearly incorrect. As the court below stated,

> We are not persuaded by defendant's argument that a disparate impact claim may not be assured in a private, non-class action. We are convinced that a plaintiff like Lasso may assert such a Title VII claim in a case like this.
>
> In *Rule v. International Association of Bridge, Structural and Ornamental Ironworkers,* 568 F.2d 558, 566 (8th Cir. 1978), a Title VII class suit was brought but was treated at trial as one involving individual claims. The Eighth held that the district court applied the wrong standard of proof from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), instead of that from *Griggs,* which was proper for a disparate impact

> case. The court of appeals stated that "[w]hen such a challenge is made, in either an individual suit or a class action, the claim should be judged according to the standards set forth in *Griggs.*" *Rule, supra,* 568 F.2d at 566. Moreover in *Connecticut v. Teal,* 457 U.S. 440, 455-56 (1982), the Supreme Court stated that "[e]very individual employee is protected against both discriminatory treatment and practices that are fair in form, but discriminatory in operation.'" (*emphasis in original*) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431) (1971).

Petitioner does not address this statement by the Court, it simply cites wording from *McDonnell Douglas,* out of context, using the phrases "private" and "non-class". Looking again to *Teal, supra,* it is important to distinguish between the fact that a group has been injured, and that

> the fact remains however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiff's group can be "of little comfort to the victims of . . . discrimination".

Id. at 455.

It is clear that "every *individual* employee is protected against both discriminatory treatment and "practices which are fair in form, but discriminatory in operation." *Id.* at 456.

II. Is A Subjective Selection Process Used In Promotion A "Facially Neutral" Mechanism Within The Meaning Of The Disparate Impact Cause Of Action?

Petitioner argues that in this action there was no such:

> [T]est, employment requirement standard or condition operat(ing) to classify Hispanics as ineligible for promotion or bar(ring) Hispanics from the state manager's position.

Pet. at 15. The basis for this contention seems to be the lack of a particularized criteria such as a specific scored test, or a height and weight specification. Thus, Petitioner suggests that a subjective evaluative process may be maintained without regard for the degree of disproportionate impact created thereby. Petitioner would therefore argue that if an employer's selection tests created an actionable impact, the employer need only switch to a wholly subjective process notwithstanding the fact that the identical effect remained.

In support of this position, Petitioner incorrectly cites *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978) for the proposition that a subjective hiring criteria was appropriate even where "statistics at trial showed a low percentage of black bricklayers in (Employer's) workforce." This error in reading *Furnco* highlights Petitioner's misunderstanding of disparate impact. At trial, the facts were "not in serious dispute." *Id.* at 569:

> [T]here was *no evidence* that these policies and practices . . . had a disproportionate impact or effect on black bricklayers. From late 1969 through late 1973, 5.7% of the bricklayers in the relevant labor force were minority group members (*citations omitted*) while, as mentioned before, 13.3% of the man-days worked by black bricklayers.

Id. at 571-2. (*Emphasis Added.*)

In fact, section C of the Court's decision in *Furnco* directly supports respondent. In stating that a racially balanced "effect" cannot immunize an employer from "liability for specific acts of discrimination," the Court recognizes that the two actions (impact and treatment) are independent of one another. The existence of a balanced

workforce is expressly what removed *Furnco* from the realm of impact analysis. In *Wright v. Olin Corporation,* 697 F.2d 1172 (4th Cir. 1982) the court dealt with "semantic quibbling" surrounding the definition of "neutrality". It held:

> (w)hile the "facial neutrality" of (employer's program) might be subject to logical dispute, the dispute would involve mere semantic quibbling having no relevance to the underlying substantive principle that gave rise to this theory. That principle, one of profound importance in the evolution of Title VII doctrine, has as its critical feature the *consequences of employment policies rather than the "neutrality" with which the practices happen to be formally expressed.* . . . While the principle was first recognized in a context where as a matter of formal expression the challenged practice happened to be "facially neutral" in the most obvious sense of the term, it has been long applied that the "facial neutrality" was only superficial in view of the palpable correlation between the (protected classification) of the employees and its manifest consequences. (*Emphasis Added*)

Id. at 1186. Thus, Petitioner insists that a subjective process is, *per se,* not facially neutral. It seeks to immunize a method which this Court has repeatedly noted as suspect, while subjecting the more reliable, objective methods to a higher level of scrutiny.

Petitioner presses on with this misunderstanding in relying upon *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Petitioner points to that case as being "strikingly similar to the facts in this case". Petitioner either misses or ignores the critical issue.

Burdine is *clearly* an action involving disparate treatment only. There was no evidence, as there is in this

action, that the selection mechanism had drastically affected an entire class of persons over a long period. There was no allegation that Ms. Burdine was adversely affected *along with a great number of other females.*

Similarly Petitioner cites *United States Postal Service Board of Governors v. Aikens,* — U.S. —, 75 L.Ed.2d 403 (1983) to support this argument. The Petition states that:

> [E]mployee claimed that the Postal Service had discriminatorily refused to promote him to higher positions. The Court held, consistently with Woodmen's contention herein, that an employee who has shown only that he was a minority, that he applied for a promotion for which he possessed the minimum qualifications, that the employer selected a nonminority applicant, and that white persons were consistently promoted and detailed over him *and all other black persons,* established a prima facie case of disparate treatment, not disparate impact. 75 L.Ed.2d at 409. Specifically, the Court stated that: [W]e have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants." 75 L.Ed.2d at 409, n.1.

Pet. at 19 (*Emphasis Added*).

What that decision, and the findings of the lower courts in that case do not reveal, is *any* contention that the selection process had resulted in a disproportion in the racial make-up of persons ultimately holding the higher position. If we were to assume, for the sake of argument, that Aikens had shown that 65% of all qualified applicants for the position were black, and that because of the hiring process only 5% of black applicants were hired, that action would fall within the confines of the Griggs analysis.

Finally, we arrive at the Petitioner's analogy between this action and this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982). Using that action, whose central issue was accrual of back-pay, Petitioner seeks to construct a curious tautology: Because the action was brought by three individuals, and because the case involved an allegation of some general effect on a protected group, and because the Court utilized the disparate treatment analysis; therefore, all suits by individuals alleging some general effect on a protected group *must* be analyzed under the disparate treatment theory. Pet. at 20. This absurdity ignores three salient facts regarding *Ford*.

First, the plaintiffs in *Ford elected* the disparate treatment cause of action because it was clear that intent could be shown, and because of the effect on damages. *Id.* at 224 n.7. Second, it was the employer, and not the plaintiffs, who attempted to argue that the disparate treatment allocation could not be elected in that action—Plaintiffs never sought to invoke the disparate impact theory. *Id.* at 225 n.7. Finally, plaintiffs, having already sustained the burdens necessary to demonstrate intent, were seeking relief under a discretionary statute which required them to show:

> [R]espondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint.

Id. at 225 (*Emphasis Added*). It is clear that where damages are discretionary, and where the relief statute speaks to intent, plaintiffs would demonstrate intent if possible.

Thus, the core of Petitioner's argument on "neutrality" seems to rest on the premise that because there was no specific identifiable item such as a "test", the selection process is immune from challenge *regardless of the disproportionate impact it might create.* We return to the sematic quibbling discussed above, while the simple fact is that people are clearly being injured by a *process* used regularly by the employer. In *Connecticut v. Teal,* 457 U.S. 440 (1982) this court abandoned artificial distinctions relating to "where," in an employment process discrimination occurs.

> The statute speaks not in terms of jobs and promotions, but in terms of *limitations* and classifications that would deprive any individual of employment *opportunities.*

Id. at 448. (*Emphasis in the original*).

This reiteration of the correct focus—the focus on *effects* of actions is the critical point, for it illustrates that any "job-related *barrier*" which has a significant adverse effect, and acts to "deny a minority or woman employment or promotion" is prohibited because it is depriving individuals of opportunities. *Id.* at 447-8. Although *Griggs* spoke to facially neutral activities having an adverse impact, this is not license to employ wholly subjective promotion processes to circumvent "Congress' primary purpose . . . the prophylactic one of achieving equality of employment "opportunities" and removing "barriers". *Id.* at 449. Rather, it is clear that those become the same neutral policies which, if they create headwinds, are prohibited.

III. Where A Subjective Process Denies An Employee A Promotion, Is That A "Routine And Regular" Policy Where Said Process Has Been Used More Than 55 Times By Employer In The Relevant Time Frame?

Reliance upon *Coe v. Yellow Freight System*, 646 F.2d 444 (10th Cir. 1981) to advance this point is misplaced. The *Coe* court did not find that a disparate impact action was unavailable to an individual as opposed to a class. Nor did the court hold that an individual injured by a specific act had to show he was injured by a number of acts *himself*. Rather, the court stated that the *cause of action* cannot be based on "one isolated incident". *Id.* at 451. In that case, plaintiff specifically did not allege:

> that the company systematically followed a practice or procedure for hiring safety managers which is discriminatory in effect,

Id. at 451.

The court went on to note that the *mode* or method used in filling a position cannot give rise to disparate impact by itself—there must be an allegation of discriminatory effect. In the instant case, respondent did not argue below that the subjective and questionable methodology was, *per se*, actionable. It only became so when it resulted in a statistical disparity in hires: No Hispanics selected in California, Arizona, New Mexico or Texas from pool of over 40% Hispanics (Tr. at 259-263); no Hispanics ever in New Mexico despite over 40% in the underlying workforce of employer from which the position was drawn, (Tr. 97); and of 55 state managers since 1975, none were Hispanic. Pet. App. A5.

Nor are the citations in the Petition to either *Cooper v. Federal Reserve Bank of Richmond*, *supra*, or *Goff v.*

Continental Oil Co., 678 F.2d 593 (5th Cir. 1982) particularly applicable. In both of those cases, plaintiffs alleged a small number of unrelated incidents to bolster the argument that employers had intent to discriminate. In *Goff* which arose under 42 U.S.C. § 1981, not Title VII, it was necessary to show intent. Thus, Petitioner erroneously relies on this case. Even if one were to apply *Goff*, it does not support Petitioner. The decision holds only that a series of unrelated incidents submitted only to show animus, does not demonstrate intent necessary for pattern and practice.

Respondent submits that this argument is absurd on its face. An injured individual, bringing a disparate impact action, will always allege a single ***individual*** act which places him in the group that has been adversely affected. That is the means by which he establishes his membership in that group. It is not that the act done to him was "one isolated incident" which is operative. It is, rather, the fact that that same act has been repeated a large number of times over a long period with adverse effects on one group. That is exactly the situation in the cast at bar. Certainly Respondent was only made a victim of this activity once. But the sheer numbers of state managers selected in the relevant time frame, from the relevant qualified population, certainly takes this action out of the realm of an "isolated incident."

In conclusion, it seems clear that there was sufficient evidence heard by the trier of fact that:

a) There was a neutral employment mechanism

b) That over a wide-sweeping range of hires, and through a number of years that mechanism had an

adverse effect on Hispanics and the cumulative effect of these identical actions resulted in the effect claimed,

c) That Respondent was, as a member of that minority group, among those allegedly injured.

d) That Respondent has the right to assert an injury done to him in any procedural manner open to him under The Federal Rules of Civil Procedure, and is not required to file a class action.

IV. As A Matter Of Fact, Did Respondent In The Instant Case Present A Disparate Impact Case, Or A Pattern And Practice Case.

In section 2 of its Petition Woodmen simply confuses "pattern and practice" actions with those brought under the disparate impact theory. While it is true that:

> A pattern or practice disparate treatment case shares with a typical disparate impact suit the proof that an employer's practices have had a systemic adverse effect on members of a protected class. However, in "pattern or practice" cases, unlike disparate impact cases, the burden imposed on the employer to rebut the plaintiff's prima facie case is satisfied if the employer articulates some legitimate, nondiscriminatory reason for the employee's rejection. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977): Hazelwood School District v. United States, 433 U.S. 299 (1977); McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 804-805 (1973).

Pet. at 27, the difference between the two actions—and thus the correct allocation of proof and burden—is not founded in the use or lack of use of statistics, but rather is the ultimate aim of such proof. In "pattern and practice" actions, the statistics are only one component in showing an overall intent or discriminatory animus. In such cases, the statistics by themselves do not sufficiently dem-

onstrate the "effect" required in impact cases. In *Hazelwood School District v. United States,* 433 U.S. 299 (1977), the extent statistics did not by themselves show systemic discrimination that would have been necessary for disparate impact. It was, therefore, necessary to reach the higher plateau of showing intent, by demonstrating several other factors (history of overt discrimination, 55 specific incidents, etc.). The instant case does not present a diffused "statistical pattern of discriminatory decision-making," coupled with sporadic acts of discrimination, but rather a specific procedure, a specific position, and the exclusion of a specific minority group in significant numbers. This by definition is disparate impact. The burden in this action is now on the employer, and rightly so. It must show that the offending process is reasonably necessary, and that no less offensive process may effect the desired ends of Petitioner.

—o—

CONCLUSION AND PRAYER

As stated below, Respondent respectfully submits that this action presents no matter which would require this Court to issue a Writ of Certiorari. Respondent also submits that Petitioner's phrasing of the issues in its Petition seeks to obscure the fact that the Circuits are uniform in their correct treatment of the central issues presented.

For these reasons, and pursuant to the arguments presented above, Respondent prays this Court to deny the Petition.

Respectfully submitted,

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